

WC 07-256

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**FILED/ACCEPTED**

**OCT 23 2007**

Federal Communications Commission  
Office of the Secretary

October 23, 2007

***VIA Hand Delivery***

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

COPY

Re: Petition of Feature Group IP for Forbearance from Enforcement Pursuant  
to 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule  
51.701(a)(1), and Rule 69.5(b)

Dear Ms. Dortch:

On behalf of Feature Group IP West LLC, Feature Group IP Southwest LLC,  
UTEX Communications Corp., Feature Group IP North LLC, and Feature Group IP  
Southeast LLC, (collectively "Feature Group IP"), please find attached an original and  
four (4) copies of a Petition for Forbearance filed pursuant to Section 10(c) of the  
Communications Act, 47 U.S.C. § 160(c), and Section 1.53 of the Commission's Rules.

Please date stamp the enclose extra copy of this filing and return to the courier.  
Thank you for your attention to this matter. Please do not hesitate to contact me should  
you have any questions.

Respectfully submitted,

/s/

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Enc.

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Federal Communications Commission  
Office of the Secretary

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
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FEATUREGROUP IP	)	
	)	
Petition for Forbearance Pursuant to	)	WC Docket No.
47 U.S.C. § 160(c) from Enforcement	)	
of 47 U.S.C. § 251(g), Rule <u>51.701(a)(1)</u> ,	)	
and Rule 69.5(b)	)	

**PETITION FOR FORBEARANCE**

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**(Attorney for Feature Group IP)**

**October 23, 2007**

## **EXECUTIVE SUMMARY**

In this Petition for Forbearance, Feature Group IP asks that the Commission take immediate, but minimal, action, to ensure that consumers and users of Voice-Embedded Internet-based communications services and applications are allowed to employ new Internet-based technologies and applications to the fullest extent possible and that providers and enablers of Voice-Embedded Internet communications applications are given the assurance that they may deploy and offer such services without the threat that they will be mired in the archaic access charge quagmire that currently plagues legacy telecommunications.

The incumbent LECs, at&t in particular, are attempting to extend the access charge regime to Voice Embedded Internet-based communications services and applications. Incumbent LECs are exercising their continuing market power and stranglehold over access to their existing base of consumers, to block intercommunication between the Internet and the PSTN except on terms, conditions and prices they dictate, typically the highest intrastate access charge rate.

As things currently stand, would-be providers of Voice-Embedded Internet-based communications, services and applications are chilled from providing next-generation Internet services with a voice component to potential users because of the recurring attempted misapplication of access charges (and in particular *intrastate* access charges) to Voice-Embedded Internet-based communications, services and applications. Grant of this Forbearance Petition would serve to springboard advanced communications, promote universal service and network effects for Internet communications. online social

communities and Group Forming Networks,<sup>1</sup> and create innovative new service opportunities and greater efficiencies for users of telecommunications services, Internet voice applications, and other Internet-based communications tools and social networks.

Forbearance is in the public interest because, by forbearing, the Commission will bring to an end the current legal uncertainty created by the anti-consumer, anti-competitive, anti-innovation misapplication of access charges, the legally insupportable self help actions of ILECs and the misguided claims that ILECs have made with respect to whether interstate and intrastate access charges apply to Feature Group IP serviced IP-PSTN and incidental PSTN-PSTN traffic. Denial of forbearance serves no positive purpose except to stall innovation and communications advances. Forbearance is now required because without such forbearance, specific competitive harm will be imposed upon all new technology entrants who develop and use telecommunications to provide Information Services.

It will not further the public interest to allow the ILECs to abuse their market dominance and – through self-help behavior rather than regulatory permission – to make IP-PSTN traffic and the incidental traffic described herein subject to access charges. Any fair and impartial reading of the Telecom Act and implementing rules makes clear that this traffic is *not* to be subjected to access charges. at&t and the other ILECs within their respective serving territories, still maintain *de facto* control over the narrowband access market. There is no reason why users of the narrowband PSTN should be denied the benefits of participating in Internet based communications simply because they do not have a broadband connection. They must not be relegated to the sidelines of the Internet communications revolution, especially when Internet-based communications providers

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<sup>1</sup> See *infra*, p. 14, for discussion of Group Forming Networks.

are ready and able to allow them entrée, but for the imposition of excessive and unjustified access tolls.

The rules from which Feature Group IP seeks forbearance are not necessary to ensure that the exchange of traffic between LECs and telecommunications carriers serving Internet-based voice providers is just and reasonable. Indeed, grant of Forbearance would merely allow Feature Group IP to proceed within a fair reading of the law without allowing ILECs to misinterpret and game the access charge regime to their sole financial advantage at the expense of consumers and the growth of Internet-based communications.

Because of their continuing excessive control over the broad base of consumers, ILECs, without regulatory check, still have the power to extract excessive tolls from us and, by extension, our customers unless and until a regulatory authority officially tells them that they cannot use their power to extract unlawful and unjustifiable, and non-cost based access revenue from enablers of Internet-based communications.

If the Commission grants this Petition for Forbearance, traffic exchange will simply occur pursuant to Section 251(b)(5) of the Act, the Commission's implementing rules, and state-approved, and in some cases arbitrated, interconnection agreements or, if the two LECs agree, under the *ISP Remand* regime. The statute, rules and agreements will ensure that rates and practices are just and reasonable. Grant of this Forbearance would have, albeit minimally, the added benefit of encouraging ILECs to work more vigilantly to resolve the complex intercarrier compensation regime, because forbearance would preclude the ILECs from continuing to misinterpret the rules to extract unfair compensation from enablers of Internet communications. The Commission can and must

take this step now to end these wrongful, anti-competitive, anti-consumer and anti-innovation actions by the industry's dominant players with an ostensible stranglehold on access by and between too many captive consumers and would-be application innovators.

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**PETITION FOR FORBEARANCE**

**I. Introduction**

Feature Group IP West LLC, Feature Group IP Southwest LLC, UTEX Communications Corp., Feature Group IP North LLC, and Feature Group IP Southeast LLC, (collectively "Feature Group IP"), through its attorneys, petitions the Commission for forbearance, as detailed below, in an effort to ensure and foster the timely deployment and growth of Internet-based communications, technologies, networks, services and applications.

Chairman Martin recently stated:

Competitive forces spur innovation and push prices down. When a regulatory issue comes before me, my first instinct is to pick the action that will help facilitate and promote competition, innovation, and consumer choice.<sup>2</sup>

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<sup>2</sup> Remarks of FCC Chairman Kevin J. Martin National Cable & Telecommunications Association Las Vegas, NV, May 7, 2007 (noting that cable and VoIP entry into the voice market dominated by an incumbent has not been easy, and citing recent FCC efforts to create market-opening policies promoting interconnection and access rights that were affecting cable and VoIP providers' ability to offer competing voice service. *See, e.g., Time Warner Cable Declaratory Ruling*).



In line with Chairman Martin's instinct, we ask herein that the Commission ensure that consumers and users of Voice-Embedded Internet-based communications<sup>3</sup> services and applications are allowed to employ new Internet-based technologies and applications to the fullest extent possible and that providers and enablers of Voice-Embedded Internet communications applications are given the assurance that they may deploy and offer such services without the threat that they will continue be hobbled by the prospect of becoming mired in the archaic access charge quagmire that currently plagues legacy telecommunications. The incumbent LECs (and, in particular at&t) are attempting to extend the access charge regime to Voice Embedded Internet-based communications services and applications in litigation, in interconnection negotiations, in state arbitrations and before this Commission. Incumbent LECs are exercising their continuing market power and stranglehold over access to their existing base of consumers, to block intercommunication between the Internet and the PSTN except on terms, conditions and prices they dictate. Specifically, they insist that Internet-based services and applications must pay access charges any time any portion of the PSTN is involved.

As things currently stand, would-be providers of Voice-Embedded Internet-based communications, services and applications are chilled from providing such applications

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<sup>3</sup> Voice-embedded *IP* communications is generally referred to as "Voice-over-Internet Protocol" or "VoIP." Voice-embedded *Internet* communications is a particular subset of such communications that do not merely use the Internet Protocol to transmit voice signals undifferentiated from PSTN traffic, but actually uses Internet Protocol to provide voice applications as part of a larger Internet communications experience. Feature Group IP uses "Voice-embedded Internet communications," because that term more accurately describes voice as just one of many applications that can be transmitted in IP format, including applications that integrate voice with data, video, or other things. We think it is important for policymakers to recognize a qualitative difference between services that merely use IP technology to provide PSTN-equivalent offerings and services that embed IP-based voice applications as part of a larger, next-generation Internet communications experience. There is significant overlap in the use of the terms "Internet-based" communications and "IP-based" communications. Acknowledging the often subtle distinctions between the terms "Internet communications" and "IP-based communications," we attempt, in this Petition, to use the term that best relates to the particular context in which the service or application is being considered.

to potential users because of the recurring attempted misapplication of access charges to Voice-Embedded Internet-based communications, services and applications. Without grant of this Petition, the growth of online social communities, Group Forming Networks, and the positive network effects<sup>4</sup> of Internet-based communications will be dramatically stalled in the United States, and American consumers, particularly those consumers without broadband connections, will not be able to avail themselves of the full promise of Internet communications.

As will be further explained below, the Commission can break this logjam. It can hold that Voice Embedded Internet-based communications, services and applications that involve or are part of (i) a net change in form; (ii) a change in content; and/or (iii) an offer of non-adjunct to basic enhanced functionality are enhanced services and, therefore, that the so-called "ESP Exemption" from access charges still applies and this exemption is carried forward into the intercarrier compensation regime under either § 251(b)(5) or the *ISP Remand Order* (e.g., § 201). If the Commission reaffirms these principles, it can deny this Petition, without harming or stifling emerging Internet networks and applications. On the other hand, if the Commission holds that Voice Embedded Internet-based communications, services and applications that do involve a net change in form, a change in content and/or an offer of non-adjunct to basic enhanced functionality are not exempt from access charges, or the ESP Exemption is not carried forward into intercarrier compensation pursuant to § 251(b)(5) or § 201, then the Commission must forebear from application of certain express and implied provisions of Section 251(g) of

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<sup>4</sup> A "network effect" is a characteristic that causes a good or service to have a value to a potential customer which depends on the number of other customers who own the good or are users of the service. Definition from Wikipedia [http://en.wikipedia.org/wiki/Network\\_effect](http://en.wikipedia.org/wiki/Network_effect).

the Communications Act of 1934, as amended (“Act” or “Communications Act”), Rule 51.701(b)(1), and, where applicable, Rule 69.5(b).

Almost four years ago, Level 3 began its request for forbearance from the application of access charges to IP-based communications services with the following:

As [former] Chairman Michael Powell has stated, IP-based voice communication is ‘a lifestyle-changing, new, fantastic technology’ and ‘the most vibrant innovation to come into the American economy, the global economy in decades – in centuries even.’<sup>5</sup> As Commissioner Michael Copps stated at the FCC’s December 1, 2003, Voice-over-Internet Protocol (“VoIP”) forum, ‘[i]t’s incumbent on [the Commission] to identify good policy going forward and not just shoehorn VoIP into statutory terms or regulatory pigeonholes without adequate justification. It’s no slam dunk that the old rules even apply.’<sup>6</sup> Bearing these principles in mind with respect to IP communications, the Commission must distinguish those rules that, in a competitively-neutral and technologically-appropriate manner ....<sup>7</sup>

Level 3, however, withdrew its request on the eve of a required ruling, and, as a result, this Commission, the communications and computer industries and users all missed the opportunity for resolution of the issue as presented by Level 3.

Feature Group IP is now putting forth what we regard as a more forward-looking, technology-advancing Petition for Forbearance. Within this Petition and appended documentation, we provide the technological, economic and policy reasons why forbearance is not only justified, but is now required due to anti-competitive actions – principally by at&t, but mimicked by other incumbents. The incumbent monopolists who wished to prevent forbearance for their own financial interests (*i.e.*, extending the access

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<sup>5</sup> Kudlow & Kramer: Interview with Chairman Michael K. Powell (CNBC Television, Nov. 19, 2003).

<sup>6</sup> Opening Remarks of Michael J. Copps, FCC Voice Over Internet Protocol Forum (Dec. 1, 2003), available at [http://hramfoss.fcc.gov/edocs\\_public/attachmatch/DOC-241765A1.pdf](http://hramfoss.fcc.gov/edocs_public/attachmatch/DOC-241765A1.pdf) (last visited Dec. 19, 2003).

<sup>7</sup> Petition, *In the Matter of Level 3 Communications L.L.C. Petition For Forbearance Under 47 U.S.C. 8 160(c) From Enforcement of 47 U.S.C. 8 251(g), Rule 51.701(b)(1), And Rule 69.5(b)*, WC Docket 03-266 (filed Dec. 23, 2003) (*Level 3 Forbearance Petition*).

charge regime to IP-PSTN communications to extract as much monopoly rent in the form of unjustified access payments from Internet-based communications) have carried the day in the wake of withdrawal of the *Level 3 Forbearance Petition* and have been, in the absence of a clear statement, been, *de facto*, allowed to continue and expand their attack on, and stifling of, new technology, services and applications. The Commission must put an end to incumbent LEC efforts to stifle innovation and competition and to extract new monopoly rents from emerging voice-embedded Internet applications. Without action, not only will current users of broadband Internet-based communications services not be able to experience the full network effects of Group Forming Networks and Internet communications, but those consumers without broadband Internet access will also not be able to experience the positive network effects of Group Forming Networks and other benefits of Voice-embedded Internet communications.

To this end, Feature Group IP now comes before the Commission with a new Petition, under duress from the actions of at&t and the inactions of the administrative and legal bodies whose duties are to implement the Act and enforce its provisions in order to promote competition and deployment of advanced telecommunications capabilities. Grant of this Forbearance Petition is one way to allow the Internet and advanced telecommunications capabilities to evolve on a timely basis without being mired in the current, uncertain morass of the intercarrier compensation regime.

The Supreme Court recently observed that the Bell Companies have demonstrated hostility to the intent of the 1996 Telecom Act because the Act "did more than just subject the ILECs to competition: it obliged them to subsidize their competitors with their own equipment at wholesale rates." Intent on "keeping [their] regional dominance," they

“thwart CLECs’ attempt to compete” and “keep them out” through “flagrant resistance to the network sharing requirements of the 1996 Act.”<sup>8</sup>

As in *Trinko*,<sup>9</sup> the Supreme Court ruled not to allow Federal courts to apply antitrust laws to the telecommunications competition issues, at least where a complex regulatory regime can be better overseen by the expert regulatory agencies. The Supreme Court essentially trusted regulators to “get it right” by interpreting both the letter and spirit of the Telecom Act to promote competition and advance new technology, services and applications. This you must now do. Feature Group IP requests forbearance so that at&t may no longer *arbitrage* the *network effect* of all inter-model communications for its own ill-gotten gains at the expense of consumers, entrepreneurs, innovators and the U.S. economy. Just as calls to the Internet were not allowed to be “gamed” by CLECs for ill-gotten profits,<sup>10</sup> calls from the Internet should not be “gamed” by the controllers of terminating bottleneck facilities and customers for profits they have not earned, based on intercarrier compensation relationships that should not logically apply to next-generation Internet-based communications.

While discussions on the merits of new technology in communications, like the *Level 3 Forbearance Petition*, generally focus on the importance of the enabled services and applications, they generally give substantially less emphasis to the importance of the positive externalities brought about by the network effects themselves. The potential

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<sup>8</sup> *Bell Atl. Corp. v. Twombly*, -- U.S. --, 127 S. Ct. 1955, 1972-73 167 L. Ed. 2d 929, 948 (2007).

<sup>9</sup> *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 402, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004).

<sup>10</sup> Which is the effective result from the Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, WC Docket 01-92, FCC 01-131, 16 FCC Red 9151, (Apr. 2001) (hereinafter “*ISP Remand Order*”), *rev’d on other grounds and remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) (“*WorldCom*”) and the express intent of our arbitrated language and bargained for language in our existing ICA with at&t.

impact of the positive externalities of network effects, however, has not been lost on at&t. In an effort to exert and extend its control over consumers and Internet application providers, particularly those with an embedded voice communications capability, at&t is currently waging war on both unique applications and the positive network effects associated with interconnecting new technologies with old. In its affirmative attack on Feature Group IP's service, at&t has finally revealed its anti-competition, anti-innovation and anti-consumer position that pure Internet-based voice applications are subject to access charges where they incidentally terminate to the PSTN. In support of its erroneous position, at&t is currently exploiting the fact that many VoIP providers (*e.g.*, Vonage and cable modem-based VoIP providers) have chosen, for ease of interoperability, to emulate PSTN number representation.<sup>11</sup> Such a position cannot be cost-justified, and serves only to stifle the development, deployment, growth and uptake of next-generation Internet-based communications networks and applications.

In its effort to impose the out-moded access charge regime on services not contemplated before the Telecom Act, at&t is mounting an attack on the positive externalities of the network effect of evolving Internet-based communities and networks. Ultimately, at&t's design is to make all communication with the PSTN require a unique 10 digit phone number issued by the North American Numbering Plan Administrator ("NANPA"), or such communications will summarily be deemed fraudulent or, at least, subject to the highest available intercarrier compensation charge. In the Internet voice world this is the equivalent of the Postal Service requesting that all e-mail servers must be "hosted" by the local post office where users must pay to log on and check e-mail. In

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<sup>11</sup> In essence, at&t is saying that the number representation in the Signaling System 7 CPN parameter is determinative for the wholesale billing relationship as between CLECs and ILECs. This means that Vonage does not owe the money directly, but that Vonage's CLEC vendor does.

essence, at&t wants to prevent new technology use unless it can directly profit from it or not cannibalize its existing revenue streams. The result would be that at&t obtains ill-gotten revenue at the expense of consumers, the American and global economy and the evolution of the Internet and Internet-based communications and networks.

In a modern understanding of networks, the underlying physical network is differentiated from the logical network primarily by multiplicity: for every network of  $N$  users, there are an exponential number of possible logical networks. The collection of these networks encapsulates the total number of possible sub-groupings of users at the application level. Recent developments in technology manifested through applications such as Facebook and MySpace have provided new modes of interaction and direct user control of network appearances that are allowing users to actualize previously inaccessible sub-groupings at an accelerating rate.<sup>12</sup> The term "Group Forming" is used to describe this phenomenon, and such networks are referred to as Group Forming Networks ("GFN").<sup>13</sup> The theory of Group Forming Networks provides an elegant and powerful description of all possible modes of communication within and between networks. This allows for the balanced treatment of understanding legacy point-to-point POTS communications vis-à-vis novel point-to-point Internet-based communications such as Skype.

This treatment allows us to understand more fully the technological chilling effect and consequent loss of economic and social value that would result if at&t is allowed to

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<sup>12</sup> How many Americans under 25 have a White Page Directory listing? Now ask how many identify themselves through Facebook, or MySpace or both? Does each social network appearance need to be identical? No. Compare the usefulness and control that person has over identity applications like MySpace when compared to a 10-digit geographically tied down telephone number.

<sup>13</sup> For more on Group Forming Networks, see David Reed's links at <http://www.reed.com/dprframeweb/dprframe.asp?section=gfn>.

continue to advance its policies, and to compel GFNs, or those enabling GFNs, to pay “toll” to interact with the PSTN. Incidental access to consumers on the narrowband PSTN should not be deemed so special or sacrosanct that the toll-seeking gatekeeper of such access should be allowed to disrupt the efficient and natural evolution, growth and positive network effects of GFNs. From a regulatory point of view, failure to keep controllers of PSTN bottlenecks in check would allow such gatekeepers to arbitrage and co-opt the underlying technology and positive network effects at the expense of advancing next-generation communications capabilities enabled by the Internet and IP-based technology. This would not be the first time that at&t has advanced that strategy to kill competition and technical innovation until it could control it and arrogate to itself all the value and profit deriving from innovation and technological advancement. In essence, doing nothing allows at&t to abuse its position of controlling the PSTN to control the adoption and use of new technology, stifling innovation and invention.<sup>14</sup>

Fortunately, the FCC has already addressed this exact issue, at a time when at&t (then AT&T) was still a regulated monopoly. The FCC created and implemented the Enhanced Service Provider Exemption which exempted new technology companies from being under the control of the monopolist by allowing those companies *not* to pay access charges. at&t’s current strategy is, in essence, to pretend that the ESP exemption was not intended to apply to Voice Embedded IP-based communications, services and applications related traffic.<sup>15</sup> The FCC must make it clear, as it recently did in the *Time*

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<sup>14</sup> Consider Bell control and deployment, or reluctance to deploy DSL technology, mobile technology, VoIP technology, unless and until it became clear that Bell would not cannibalize existing revenue streams and would be allowed to control the genie without threat of competition.

<sup>15</sup> As further described in this Petition, Feature Group IP has diligently worked within the confines of the current law and the ESP exemption from its inception in 2000, when its founders got at&t (then SBC) to agree to “No compensation due for all traffic to or from ESPs.” For more than five years now, we have



*Warner Order*,<sup>16</sup> and as Chairman Martin and the other Commissioners have repeatedly opined, that the FCC supports competition from alternative business models, especially when those business models are crafted with “good public policy” in mind. A public policy that supports technological innovation and invention and protects and enhances the positive network effects and benefits to society brought about by Group Forming Networks is such a policy.

Feature Group IP now files this Petition requesting that the Commission forbear from enforcing its governing statute and rules to the extent that such statute and rules could, arguably, be interpreted to permit LECs to impose interstate or intrastate access charges on Voice Embedded IP-based communications, services and applications that involve or are part of (i) a net change in form; (ii) a change in content; and/or (iii) an offer of non-adjunct to basic enhanced functionality when there is an end-point on the Public Switched Telephone Network (“PSTN”).<sup>17</sup> Specifically, Feature Group IP seeks forbearance for Voice Embedded IP-based communications, services and applications related traffic that (1) originates in IP format and terminates to the legacy “Time Division Multiplexed” (“TDM”) circuit-switched telephone network; (2) originates on the legacy TDM circuit-switched telephone network and is addressed to an IP-based end point; or (3) originates on the legacy TDM circuit-switched network and terminates on the legacy

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been attempting to arbitrate and modernize the signaling, routing and rating of all new technology traffic, and have yet to have an actual hearing to resolve these issues on a going forward basis. Further, no such hearing to establish clear new rules on signaling, routing and rating is in sight.

<sup>16</sup> *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order (Adopted March 1, 2007) (*Time Warner Cable Order*).

<sup>17</sup> For purposes of this Petition, the “PSTN” is the same as the definition of “Public Switched Network” as defined at 47 C.F.R. § 20.3: “Any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services.”

TDM circuit-switched network but (a) is connected to an IP-based platform during the call session and (b) as a result to use of the IP-based platform, there is a change in content or non adjunct-to-basic enhanced functionalities are offered to the user. Communications between an IP-based end point and a legacy TDM circuit-switched end point – regardless of which end-point initiated the session – will hereinafter be referred to as “IP-PSTN traffic.” “Incidental” traffic occurs where all of the relevant end-points are on the legacy TDM circuit-switched network but an IP-based platform is involved and there is a change in content and/or non adjunct-to-basic enhanced functionalities are offered.

This particular Forbearance request is also limited to those communications that traverse Feature Group IP’s Internet Gateway Intermediation Point of Presence (“IGI-POP”) services. Accordingly, the requested forbearance would initially extend only to Feature Group IP. Logically, however, any LEC that tariffs its services as a common carrier on a LATA by LATA basis and commits to operate in a non-discriminatory manner that furthers the pro-technology policies spelled out by Feature Group IP in this Forbearance Petition could also apply for its own forbearance.<sup>18</sup>

While Feature Group IP does not, at present, agree to any geographic exemptions, or any exemption based on the type of ILEC (*e.g.*, small or large, rural or urban) still reigning over captive PSTN customers, Feature Group IP would voluntarily exclude from

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<sup>18</sup> Feature Group IP’s Internet Gateway Intermediation Point of Presence (“IGI-POP”) Tariff is attached to this Petition as Appendix A and may also be accessed at [http://www.featuregroupip.net/wp-content/uploads/2nd\\_Revision\\_to\\_UTEX\\_Tariff\\_FCC\\_No.1.pdf](http://www.featuregroupip.net/wp-content/uploads/2nd_Revision_to_UTEX_Tariff_FCC_No.1.pdf). The corresponding explanations which were filed at the FCC are available at <http://www.featuregroupip.net/regulatory-issues>. As explained in the tariff filing, this tariff was filed as a competitive response to the at&t “TIPToP” tariff. While both tariffs require “Situs” (a logical presence in the LATA so that all traffic to and from the Tariff Customer is never “interLATA” from the perspective of the offering LEC) that is where the similarities stop. Feature Group IP does not require utilization of Legacy SS-7 signaling and purchasing of Legacy signaling. TIPToP does; Feature Group IP does not require presentation by the customer of its own 10 digit phone numbers. TIPToP functionally does; IGI-POP requires its customers to both a) not be a carrier and b) to affirmatively claim the ESP exemption so to be able to buy a flat rated product. TIPToP is silent on the ESP exemption, but discriminates against non IP-VIS traffic by charging a high-per minute rate.

this Forbearance request any incumbent LEC from any rural area, upon a finding by the Commission that the subsidies and inherent non-cost based arbitrage of the current inter-carrier regime that the rural LEC claims are in fact necessary and that this need for implicit support outweighs the positive network effects and other benefits that would result from allowing rural Americans to participate in Group Forming Networks and other Internet-based communications communities. We suggest that, if this Commission wishes to “restrict” competition and preserve the implicit subsidies to LECs, it can do so by selectively excluding Forbearance relief in those markets served by an ILEC that is exempt from Section 251(c) pursuant to Section 251(f)(1); or by excluding forbearance relief in those circumstances where a user of a voice-embedded Internet communications service is calling customers of a “local” ILEC with fewer than 5,000 access lines.

Grant of this petition is required by Section 10(a) of the Communications Act of 1934, as amended (“Act”). In accordance with Section 10(a)(3), forbearance is in the public interest because, by forbearing, the Commission will bring to an end the current legal uncertainty created by the anti-consumer, anti-competitive, anti-innovation misapplication of access charges to IP-PSTN interconnection, the “litigious self help actions of at&t” and the misguided claims at&t has made with respect to whether interstate and intrastate access charges apply to Feature Group IP serviced IP-PSTN and incidental PSTN-PSTN traffic. Denial of forbearance serves no positive purpose except to stall innovation and communications advances while allowing at&t to line its pockets at the expense of consumers. Forbearance would simply verify that the Enhanced Service Provider Exemption<sup>19</sup> should and must logically apply to Feature Group IP’s customers.

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<sup>19</sup> The following is how Feature Group IP defines the application of the ESP Exemption in our FCC filed Tariff and how we have implemented our services:

In the wake of at&t efforts to extract toll from us and other providers of voice-embedded Internet communications so that we might bring the benefits of Internet communications, such as allowing them to realize the network effects of GFNs, we believe there is no other way for us to effectively implement the legal affirmative election of this exemption made by our customers. at&t has successfully launched an anti-competitive campaign to subvert the ability of new technology to be adopted in a competitive way unless and until such new technology strictly adheres to old protectionist monopoly rules and unless the provider of new technology agrees to pay the monopolist controller of old technology for "access" to communicate.<sup>20</sup> Thus, forbearance is now required because without such

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**Enhanced Service**

"Enhanced service" means voice mail, Internet service (including Voice Over Internet service), tele-messaging services, information services and other services a Feature Group IP customer states is an enhanced service under Section 153(20) of the Act and/or 47 CFR §64.702.

**Enhanced Service Provider or ESP**

ESPs include but are not limited to voice mail companies, Internet Service Providers, Information Service Providers and tele-messaging companies. For purposes of this agreement, all ESPs, whether affiliated or not, are to be treated as End Users if the ESP avails itself of the ESP exemption upon order of service from Feature Group IP.

**ESP Exemption**

The "ESP Exemption" is an affirmative exercise of federal regulatory authority over interstate service whereby, despite heavy use of interstate service, the FCC allows ESPs to purchase flat rated local service to terminate and originate traffic over Local Exchange Carrier and CMRS networks without creating any liability for the payment of traditional Exchange Access charges. When an ESP takes advantage of the ESP exemption, it is exempt from being charged Interstate or Intrastate Interexchange services on a usage sensitive basis. An ESP, at its election, may choose to not avail itself of the ESP exemption and instead subscribe to interstate Access tariffs such as the new SBC TIPTOP tariff. Feature Group IP shall only sell IGI-POP services to entities which claim the ESP Exemption.

<sup>20</sup> In discovery produced in Texas, at&t admits to launching "Access over Local" revenue retention campaigns aimed against the CLECs they know are handling VoIP applications. For example, at&t modified their billing systems and platforms to pretend everything is really an ordinary long distance call which can be billed to an interconnecting CLEC while behind the scenes they focus on creating rules that target Internet-based VoIP Applications. The attack is simple but deadly. Internet-based VoIP users do not usually have what at&t considers to be a "Valid" CPN (e.g., a 10-digit geographic telephone number active in the LERG). at&t contends the CLEC is subject to intrastate access charges since the call is not demonstrably "local." This campaign also classifies as "toll" applications like Vonage or any IP-based service that does signal an ordinary phone number as if the calling and called numbers are associated with rate centers that are not "local" to each other, and, thus, Vonage signals it willingly wants to purchase "exchange access" from the LECs. This Campaign is targeted only against new entrant CLECs. ILECs do not apply this treatment to other ILECs. at&t refuses to acknowledge note 92 in the *AT&T Declaratory Ruling*, which admonished ILECs not to assess access charges against interconnecting CLECs but, instead

forbearance, specific competitive harm will be imposed upon all new technology entrants who develop and use telecommunications to provide Information Services.

Feature Group IP requests forbearance for these forward-looking policy reasons; but also needs forbearance for survival.<sup>21</sup> at&t has revealed through discovery in a state complaint case<sup>22</sup> and through information disclosed in an indefinitely-abated arbitration case that its business practices no longer recognize that Information Services, Enhanced Services and Internet services are to be exempt from per minute, non-cost based charges.

at&t also provided answers to Feature Group IP's requests for admissions in a pending Federal court proceeding related to historical abuses and violations of our existing Interconnection Agreement with at&t. Collectively, at&t – for the first time – specifically characterizes each and every sort of Voice Embedded IP-based

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to charge the IXC. *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order (2004). at&t refuses to acknowledge the Commission's finding in the *Vonage Order* that numbers no longer matter when it comes to IP-based services. See *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order (2004) {“*Vonage Order*”}.

<sup>21</sup> See active Dockets 26381 and 33323 at the Texas PUC. Amazingly, for five and a half years, Feature Group IP has been unable to arbitrate a new agreement to deal with wholesale interconnection provisions when service to an ESP is involved. at&t's self-help attempts to eliminate the ESP exemption at the Texas PUC and to ignore the bargained for language in the existing contract is only now being heard in the context of a post-interconnection agreement dispute resolution on an agreement that is ten years old. Feature Group IP's current compensation section states that “no compensation is due for all traffic to or from an ESP.” Notwithstanding the express language, the Texas PUC has certified at&t's attempt to collect access fees from Feature Group IP for traffic from Skype and Vonage must be resolved by December 6, 2007 or the Texas PUC may force Feature Group IP to post the equivalent of a bond equal to at&t's fraudulently billed access charges just to keep Feature Group IP's ESP traffic flowing.

<sup>22</sup> See, *infra*, Appendix C, *Pre-Filed Direct Testimony of Soren Telfer in Texas PUC Docket No. 33323*, which describes the current at&t billing system and SS-7 content delivery billing practice. What is particularly disturbing about this content delivery policy is it was cooked up in secret during and after the same periods Feature Group IP was asking at&t to establish a mutual policy about what to represent when traffic comes from an Internet user who may not also have a 10 digit phone number. Not knowing the top secret billing policies by at&t, and not having at&t negotiate in good faith with Feature Group IP led us to our own policy creation which (1) encourages any 10 digit number that can be reversible, if one exists, and (2) if no 10 digit number exists, encourages a unique representation of some information to allow potential identification of the calling party by the called party. It turned out that our policy added fuel for the anti-competitive billing system created by at&t. For each call that had a non-routable identifier in its content of CPN or an 8yy identifier in its content of CPN, at&t increased its charges by seven fold to Feature Group IP.

communications, services and applications, from Skype, to Vonage to Xbox users, as all being subject to “Exchange Access” charges. While the specifics over how Feature Group IP has been historically damaged by the at&t breaches of our contract will, perhaps, be determined by the Texas PUC and courts, there can be no doubt now that this forbearance is now essential to prevent further market damage to the industry and to Feature Group IP.

Feature Group IP wants to expand its footprint. We have state authorizations throughout the country. We, however, are bogged down in Texas. at&t’s refusal to deal, and its insistence that it can force Feature Group IP to pay access when access does not apply either to our ESP customers, or – even if the traffic is not exempt – to Feature Group IP since we would be a joint provider rather than an access customer, has prevented us from implementing the business plan.

It will not further the public interest to allow at&t and the rest of the ILEC cartel<sup>23</sup> to abuse their market dominance and – through self-help behavior rather than regulatory permission – to make IP-PSTN traffic and the incidental traffic described herein subject to access charges. Any fair and impartial reading of the Telecom Act and implementing rules makes clear that this traffic is *not* to be subjected to access charges. at&t and the other ILECs within their respective serving territories, still maintain *de facto* control over the PSTN access market. Feature Group IP, and its founders, have built a unique business model on symmetrically treating all Internet traffic the same regardless of direction or application. That business model does not rely on intercarrier compensation; all of our

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<sup>23</sup> <http://dictionary.reference.com/browse/cartel>.

revenue comes from our customers, not from other carriers.<sup>24</sup> We have consistently sought to negotiate “no compensation” terms for all forms and types of traffic, in each direction, with every one of our directly or indirectly interconnected carrier providers.

We have also used technology to solve problems (like “Phantom Traffic”) and do not blame the emerging technology for exposing the reality that the old way of doing things – extracting excessive tolls from providers seeking to gain access to captive consumers of local telephone service – is less useful. We support, but the legacy carriers attempt to crush, spreading the benefits of positive network effects not only to providers but also to users. This is the model that has propelled the viral growth of the Internet. Facebook offers more user-control and options than the whitepages, but both identify users. Skype, too, offers more variability than international operator service companies, but both allow for international real-time voice communication. And, Universal Global Title (invented by Feature Group IP) representation is better than assuming all new technology is a phantom IXC perpetrator of fraud.<sup>25</sup>

Moreover, consistent with Section 10(a)(1), the rules from which Feature Group IP seeks forbearance are neither necessary to ensure that the exchange of traffic between LECs and telecommunications carriers serving Internet-based voice providers is just and

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<sup>24</sup> This is precisely what the Commission said it wanted to happen. *ISP Remand Order* ¶¶ 67, 83. See also *Intercarrier Compensation NPRM*, ¶ 56.

<sup>25</sup> The regulated companies of at&t have refused to discuss directly the signaling issues related to interconnecting new technology with old technology. The only statements and positions we have been able to divine have been from the *Missoula Plan* proceeding. *In the Matter of the Missoula Intercarrier Compensation Reform Plan*, Docket 01-92, DA 06-1510 (“*Missoula Plan*”). Feature Group IP’s filings in response to the *Missoula Plan* may be accessed at <http://www.featuregroupip.net/regulatory-issues/>. We are convinced that our filings demonstrate how the industry can solve the so called “Phantom Traffic” problem. See [http://www.featuregroupip.net/wp-content/uploads/missoula\\_comments.pdf](http://www.featuregroupip.net/wp-content/uploads/missoula_comments.pdf); [http://www.featuregroupip.net/wp-content/uploads/Missoula\\_Phantom\\_Interim\\_Process\\_and\\_Call\\_Detail\\_Proposal\\_Comments.pdf](http://www.featuregroupip.net/wp-content/uploads/Missoula_Phantom_Interim_Process_and_Call_Detail_Proposal_Comments.pdf). To date, at&t has refused to engage Feature Group IP on our proposals. It prefers to insist that all traffic should be billed as ordinary access. We do not want to sell ordinary access, pay ordinary access, or force our customers to pay it either.

reasonable. Indeed, grant of Forbearance would merely allow Feature Group IP to proceed within a fair reading of the law without allowing at&t to misinterpret and game the access charge regime to its sole financial advantage at the expense of us, consumers and the growth of Internet-based communications. Grant of forbearance would simply confirm what is already solid law, but which at&t and other ILECs simply refuse to accept.<sup>26</sup> Because of their continuing excessive control over the broad base of consumers, they have the power to extract excessive tolls from us and, by extension, our customers unless and until a regulatory authority officially tells them that they cannot use their power to extract unlawful and unjustifiable, and non-cost based access revenue from enablers of Internet-based communications.

If the Commission grants this Petition for Forbearance, traffic exchange will simply occur pursuant to Section 251(b)(5) of the Act, the Commission's implementing rules, and state-approved, and in some cases arbitrated, interconnection agreements or, if the two LECs agree, under the *ISP Remand* regime. This understanding should already be the governing principle, but to the extent it is not, then that is the rule that would govern upon a grant of forbearance to the extent and to where forbearance is deemed appropriate. The statute, rules and agreements will ensure that rates and practices are just and reasonable, and not unjustly or unreasonably discriminatory. To the extent there is some difference between the traffic subject to this Forbearance Petition and circuit-switched traffic, that difference is transitional only, as the Commission can (and ultimately will) fully address any such difference as it adopts a unified intercarrier compensation regime. Grant of this Forbearance would have, albeit minimally, the added

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<sup>26</sup> *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri v. Missouri Public Service Commission*, 461 F. Supp. 2d 1055; 2006 U.S. Dist. LEXIS 65536 \*49-\*81 (E.D. Mo. 2006); *In re Transcom Enhanced Servs., LLC*, 2005 Bankr. LEXIS 1244 (Bankr. N.D. Tex. Apr. 28, 2005).



benefit of encouraging ILECs to work more vigilantly to resolve the complex intercarrier compensation regime, because forbearance would preclude the ILECs from continuing to misinterpret the rules to extract unfair compensation from enablers of Internet communications.

Allowing at&t to apply non-cost based access charges to IP-PSTN calls and the non-carriers who thrive on the Internet exactly because there is no top down control of "how things must be done" is bad policy and perpetuates an economically inefficient and unfair regime, both for providers and for consumers. Allowing at&t to bill CLECs for such traffic simply because an IP-to-PSTN call or incidental traffic does not fit into the archaic, illogical, and arguably fraudulent billing platform of at&t is anti-competitive.

Accordingly, all the prerequisites for forbearance enumerated in Section 10(a) are satisfied, and the Commission is therefore required to forbear from the application of interstate and intrastate access charges to IP-PSTN, and incidental PSTN-PSTN, Voice Embedded Internet-based communications, services and applications. The Commission can and must take this step now to end these wrongful, anti-competitive, anti-consumer and anti-innovation actions by the industry's dominant players with an ostensible stranglehold on access by and between too many captive consumers and would-be application innovators.

## **II. BACKGROUND**

Feature Group IP is a telecommunications carrier providing interstate telecommunications pursuant to Section 214 of the Communications Act of 1934 and